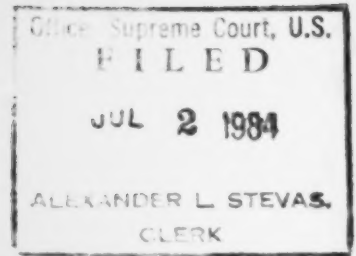


CASE NO. 83-1962



In The
Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN KOYO CORPORATION

Petitioner,

v.

EDGAR L. LINDLEY,
Tax Commissioner of Ohio,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

WHETHER GOODS HELD BY THE PETITIONER IN ITS OHIO WAREHOUSE WERE "IN TRANSIT" IN INTERSTATE COMMERCE (OR FOREIGN COMMERCE) AND THEREBY EXEMPT FROM OHIO PERSONAL PROPERTY TAXATION UNDER THE COMMERCE (AND/OR IMPORT-EXPORT) CLAUSE OF THE UNITED STATES CONSTITUTION, WHEN THE GOODS WERE PURCHASED AND IMPORTED BY THE PETITIONER FROM OUTSIDE THE COUNTRY FOR SALE TO CUSTOMERS IN THE UNITED STATES, AND WERE STORED IN THE OHIO WAREHOUSE, PENDING DELIVERY TO OUT-OF-STATE CUSTOMERS.

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STATEMENT OF THE CASE

This case originated in the Ohio Board of Tax Appeals as the result of an appeal by American Koyo Corporation (Petitioner) from a final assessment certificate of valuation issued by the Tax Commissioner for its 1977 personal property tax return year. The certificate had increased the total final assessed value of the Petitioner's property from that previously reported. The increase resulted from the Tax Commissioner's determination that the Petitioner had failed to return property which

was used in business in Ohio and was, therefore, subject to personal property tax. The appeal disputed this finding.

An evidentiary hearing was held and briefs were filed by the parties. The record revealed that American Koyo Corporation is an Ohio corporation, which is a wholly-owned subsidiary of Koyo Seiko Co., Ltd., a Japanese corporation. The parent company manufactures bearings, and the Petitioner is in the business of importing these bearings to the United States for sale. The Petitioner has an office and warehouse in Westlake, Ohio, where it receives imported bearings that have arrived in this country at the port of Baltimore. The Petitioner stores the bearings in its Ohio warehouse pending shipment to its other warehouses or delivery, as needed, directly to its customers.

The Petitioner normally sends purchase orders to its parent company's factory twice a year. The amount purchased reflects American Koyo's anticipated needs for the upcoming year based on orders received from its customers. The purchase orders to the factory usually indicate the Petitioner's intended customer, and the factory in packing the bearings indicates the Petitioner's purchase order number.

The Petitioner's purchase order directs the factory to ship bearings to it at its Cleveland (Westlake) warehouse. Because the Petitioner normally receives shipments only two or three times a year, but may make deliveries to its customers on a monthly basis, it often makes advance orders of enough to meet future deliveries. As a result, it sometimes stores bearings, which have been received, for several months, pending delivery to its

customers. In the event that one of the Petitioner's customers cancels an order, the bearings which had been purchased in anticipation of such sale would be sold to another customer.

The Petitioner sells bearings to its customers in pallet-size quantities. That is, depending on the size of the bearing sold, a certain number of bearings can be packed in cartons and bound on pallets. The Petitioner in effect then sells bearings by the pallet.

The Board of Tax Appeals determined that the bearings received for storage at the Westlake warehouse, pending sale and delivery to the Petitioner's customers, were no longer in transit but had come to rest in Ohio so as to be subject to Ohio's personal property tax. On appeal, the Cuyahoga County Court of Appeals, citing testimony in the record that the bearings were purchased from the parent company in Japan for "sale here in the United States," agreed with the Board that such bearings were no longer in transit, but were being held in Ohio for use in the Petitioner's business. It, therefore, affirmed the Board's decision.

The Petitioner subsequently filed a notice of appeal and motion to certify the case to the Ohio Supreme Court; however, on February 29, 1984, that Court overruled the motion. On May 29, 1984, the Petitioner filed with the United States Supreme Court a Petition for Writ of Certiorari to the Supreme Court of Ohio.

ARGUMENT

I. IMPORTED PROPERTY WHICH IS RECEIVED AND HELD BY THE PETITIONER IN ITS OHIO WAREHOUSE PENDING SUBSEQUENT SALE AND DELIVERY TO OUT-OF-STATE CUSTOMERS IS NO LONGER "IN TRANSIT", BUT HAS COME TO REST IN OHIO AND IS SUBJECT TO THE OHIO PERSONAL PROPERTY TAX.

The Petitioner has argued that this case presents a previously unconsidered situation, in which "pre-sold" imported property is merely in transit through a state. The Petitioner argues that the imposition of an *ad valorem* tax on such property is prohibited by Article I, Section 8, Clause 3 (Commerce Clause) and Article I, Section 10, Clause 2 (Import-Export Clause) of the United States Constitution. It is the position of the Respondent Tax Commissioner that this argument is without basis in either fact or law.

Specifically, the "in transit" concept relied on by the Petitioner is derived from the United States Supreme Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 495 (1976). In that case the Supreme Court considered whether an *ad valorem* property tax on tires held by that taxpayer at its wholesale distribution warehouse was prohibited by either the Commerce Clause or the Import-Export Clause. The Court noted that the purpose of the Commerce Clause was to preserve the federal government's power to regulate the flow of interstate commerce. With respect to the Import-Export Clause the Court noted that its purpose

was threefold, (1) to preserve the federal government's right to speak with one voice when regulating commercial relations with foreign nations, (2) to preserve import revenues as a major source of revenue for the federal government, and (3) to prevent seaboard states with ports of entry from levying taxes on citizens of other states by taxing goods that merely flow through the ports to other states.

With respect to Georgia's *ad valorem* property tax the Court found no conflict with these principles. In doing so it noted at p. 286 that the tax was a nondiscriminatory tax imposed on all goods that are no longer "in import transit." At p. 287 the Court reasoned:

"Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."

The Court also concluded that the tax did not interfere with the free flow of imported goods among the States. Noting that the petitioner's warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, the Court held that the property was not merely in transit and that there was no discrimination against the taxpayer based on the property's place of origin.

Subsequently in *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies et al.*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978), the Court reaffirmed the threefold purpose of the Import-Export Clause. The Court also made it clear that the *Michelin* decision constituted a departure from the "original package" rule.¹

It is, therefore, significant that the instant case is analogous to *Michelin Tire Corp. v. Wages, supra*. Specifically, the Petitioner purchases goods outside the United States and sells them in this country, storing them in the interim in its Ohio warehouse. As such, the assessment of an *ad valorem* tax on the property based on the Petitioner's use of the property in business in Ohio under Ohio law does not interfere with the purposes of the Import-Export Clause as outlined in the *Michelin* decision. Simply put, this is a nondiscriminatory tax applied to domestically manufactured property, as well as to imported property, based on use in this State. It in no

¹The fact that the bearings in issue may remain packed in the pallet-sized quantities in which they are eventually sold and delivered is, therefore, in no way determinative as to the right to an exemption under the Import-Export Clause.

way interferes with the federal government's authority to regulate and assess imports; nor does it place Ohio at an advantage over other states as a port state assessing property which merely flows through it to other states.²

As for the Petitioner's claim that the assessed property is "pre-sold" to out-of-state customers and, therefore, simply in transit through Ohio, the Respondent would make two points. First, the Petitioner would have this Court assume facts that the lower tribunals did not accept. The Petitioner suggests that its customers had already purchased the bearings prior to their manufacture by the Petitioner's parent company in Japan so as to have some special property interest distinguishing the case from *Michelin Tire Corp. v. Wages, supra*. Both the Board of Tax Appeals and the Court of Appeals declined to make such a finding. On the contrary, the Board expressly disagreed with the Petitioner and found that the bearings were purchased by the Petitioner from its parent company "and then sold to customers in the United States." The Court of Appeals made a similar finding. The factual basis of the Petitioner's argument has, therefore, never been established, and there is no reason for this Court to assume such facts.

Moreover, even if there were a "pre-sale" of the bearings, it would not necessarily follow that the property remained "in transit" indefinitely pending delivery to the Petitioner's customers. This Court has long recognized a break in inter-state commerce when property is brought into a state and stored there pending delivery to an out-of-state customer pursuant to an advance sale of such

² Indeed, the property in this case entered the country through the port of Baltimore.

property. Compare *General Oil Co. v. Crain*, 209 U.S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908), in which the Court held that oil brought into Tennessee for temporary storage in a tank pending distribution to fill orders for oil already sold in other states was not exempt from taxation. This Court observed that the break in movement was more than a mere delay or accommodation to the means of transportation; it was for business purposes which require giving the property a locality in the state beyond a mere halting of transportation.

This is the same principle as was relied on by this Court in *Michelin Tire Corp. v. Wages*, *supra*, when it determined the tires which had arrived at that company's distribution warehouse were no longer "in import transit." So it is here. The Petitioner's bearings are stored in its Ohio warehouse for up to six months pending delivery to its customers. As such, the importation of the bearings had clearly ended and a local business use of the property has commenced.

Finally, with respect to the Petitioner's reliance on the Indiana case of *Indiana State Board of Tax Comm'rs. v. Stanadyne, Inc.*, 435 N.E. 2d 278 (1982) as evidence of uncertainty in the law, it should be noted that the decision in that case cited and relied heavily on the language of the Indiana statute which used an "original package" test for exemption. In addition, the decision did not even mention *Michelin Tire Corp. v. Wages*, *supra*, much less distinguish it. The Petitioner's reliance on it is, therefore, misplaced.

CONCLUSION

As discussed in the foregoing brief the Petitioner has failed to raise any constitutional issues which have not already been addressed by this Court. Given the Ohio Court of Appeals' determination of facts, there is no constitutional bar to the assessment of an *ad valorem* property tax on bearings held by the Petitioner in its ... warehouse, pending sale and delivery to its customers.

The Petition for Writ of Certiorari is, therefore, without basis and should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Ohio was sent this _____ day of June, 1984 postage prepaid to Herbert Bruce Griswold, Calfee, Halter & Griswold, 1800 Central National Bank Building, Cleveland, Ohio 44114, Counsel for Petitioner. I further certify that all parties required to be served have been served.

JAMES C. SAUER*Assistant Attorney General**Counsel of Record*

